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ABSTRACT

These articles highlight reactions to the U.S. Supreme Court's landmark ruling upholding the Cleveland voucher program. "Justices Settle Case, Nettle Policy Debate" (Mark Walsh) discusses how the ruling has rejuvenated the school choice movement and reinvigorated debates over how best to improve education for all students. "Voucher Battles Head to State Capitals" (John Gehring) explains that the foundation has been laid for new legislative battles over school vouchers in state capitals nationwide. "A Great Day, or Dark One, for Schools?" (Catherine Gewertz) discusses how advocacy groups of all types reacted to the ruling. "Advocates' Post-Ruling Choice: Bubbly" (Mark Walsh) notes that voucher crusaders greeted the ruling with joy. "Catholics Laud Voucher Decision, See Potential for Growth" (Mary Ann Zehr) explains that the most ebullient response to the ruling came from educators at religious schools already participating in voucher programs. "Ruling Gives Second Wind to Capitol Hill Voucher Advocates" (Erik W. Robelen) notes that action quickly shifted to Capitol Hill after the ruling was announced. "A Long Road to the Court" examines mileposts on the way to the court's ruling. "In the Court's Words" presents excerpts from majority, concurring, and dissenting opinions in the Supreme Court decision in Zelmon v. Simmons-Harris. (SM)

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The Voucher Decision: Charting the New Landscape Of School Choice

Education Week

The U.S. Supreme Court's landmark ruling upholding the Cleveland voucher program has reverberated around the nation, reigniting the debate on how best to improve the education of all schoolchildren. Our comprehensive coverage examines reactions and possible aftereffects.

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• **Justices Settle Case, Nettle Policy Debate**
The U.S. Supreme Court's landmark ruling upholding the Cleveland voucher program has rejuvenated the school choice movement and, to a surprising degree, reinvigorated the debate over how best to improve the education of all the nation's schoolchildren.

• **Voucher Battles Head to State Capitals**
The foundation has been laid for a new round of legislative battles over school vouchers in state capitals from coast to coast. Includes a table, "Vouchers on the Ballot."

• **A Great Day, or Dark One, for Schools?**
The U.S. Supreme Court's June 27 ruling reverberated around the nation. Within minutes, advocacy groups of all stripes were issuing statements proclaiming it a great or a dark day for education. Parents and educators were celebrating, or resigning themselves to uneasy coexistence or renewed opposition. Includes "Editorial Comment," a sample of newspaper editorials.

• **Advocates' Post-Ruling Choice: Bubbly**
Voucher crusaders greet win with popping corks; opponent says next step could be more difficult.

• **Catholics Laud Voucher Decision, See Potential for Growth**
The most ebullient response to the Supreme Court's June 27 decision came from educators at religious schools that already participate in voucher programs. But people of faith are anything but

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lockstep in their reaction.

- **Ruling Gives Second Wind To Capitol Hill Voucher Advocates**
The hubbub outside the U.S. Supreme Court building had barely died down late last month before the action shifted to the big white dome across Capitol Hill's First Street.

- **A Long Road to the Court**
A look at some mileposts on the way to the Court's June 27 ruling.

- **In the Court's Words**
Excerpts from majority, concurring, and dissenting opinions in the U.S. Supreme Court decision in *Zelmon* v. *Simmons-Harris*.

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Education Week

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July 10, 2002

Justices Settle Case, Nettle Policy Debate

By Mark Walsh
Education Week

Washington

The U.S. Supreme Court's landmark ruling upholding the Cleveland voucher program has rejuvenated the school choice movement and, to a surprising degree, reinvigorated the debate over how best to improve the education of all the nation's **schoolchildren**.

The decision was perhaps the biggest advance yet for a movement that embraces not only vouchers, but also an assortment of new arrangements in public education, among them charter schools, corporate management of public schools, open enrollment, and other alternatives to traditional schools.

"I got many calls yesterday from parents who were interested not just in vouchers, but other forms of choice," Virginia Walden-Ford, the executive director of D.C. Parents for School Choice, a local group here, said the day after the court's ruling. "Every parent said, 'We won.'"

That win, specifically, meant the high court's validation by a 5-4 vote of a program that offers low-income Cleveland families tuition aid for religious as well as secular private schools. Those vouchers, the court decided, do not violate the U.S. Constitution's prohibition against a government establishment of religion. The program, the court majority said, is one "of true private choice."

Milton Friedman, the Nobel Prize-winning economist who first proposed a universal system of educational vouchers in a 1955 academic article, praised the June 27 decision as removing a major legal impediment that has restrained the idea for decades.

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"We are more and more approaching the tipping point" for the acceptance of vouchers, Mr. Friedman, who will turn 90 later this month, said in an interview last week. "The very act of removing this obstacle is a great step forward."

President Bush, for much of his 17 months in office only a quiet supporter of vouchers, suddenly

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regained his voice on the subject last week, calling the ruling "just as historic" as the court's 1954 decision outlawing segregation in education.

But opponents were quick to contend that many barriers, both legal and political, would prevent vouchers from expanding far beyond the government-supported programs that now exist in varying forms in Ohio, Wisconsin, Florida, Maine, and Vermont.

"Where do we go from here?" said Robert H. Chanin, the general counsel of the National Education Association, who argued against the Cleveland voucher program in the Supreme Court. "This does not end the legal battle. It simply means we no longer have the establishment clause [of the First Amendment] in our legal arsenal."

He said voucher programs in many states could still be attacked on the basis of state constitutional language that more explicitly bars state aid to religious institutions than the First Amendment does. And the state courts would be only one arena for battling vouchers, Mr. Chanin added.

"The first line of defense has always been political," Mr. Chanin said. "The fact that five justices approved of the idea does not mean it's good."

No Dramatic Break

The court issued its long-awaited decision in *Zelman* v. *Simmons-Harris* (Case No. 00-1751) on the last formal day of its 2001-02 term.

Chief Justice William H. Rehnquist, writing for the majority, said the state-enacted Cleveland Scholarship and Tutoring Program "is entirely neutral with respect to religion."

"It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district," he added. "It permits such individuals to exercise genuine choice among options public and private, secular and religious."

He was joined in the majority by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas.

Justice O'Connor cast the crucial fifth vote for upholding the Cleveland program, and she fully joined the chief justice's opinion while also issuing her own concurrence.

The other four members of the majority had made it clear in a plurality opinion from a case decided two years ago, *Mitchell* v. *Helms*, that they were prepared to uphold a voucher program involving parental choice and neutral treatment of religious schools.

Justice O'Connor said she did not believe the majority decision "marks a dramatic break from the past."

"The support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs," Justice O'Connor wrote. Many religious institutions benefit from tax policies that amount to significant sums of decreased tax revenue to the government, she said.

Justice O'Connor also argued that it was important to examine the voucher program in the context of other options open to Cleveland parents, such as magnet schools and charter schools, which

Ohio calls community schools.

"I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the establishment clause," she said.

But the dissenters declared that the majority had seriously weakened the nation's traditional refusal to provide significant government aid to religious institutions.

"The scale of the aid to religious schools approved today is unprecedented," Justice David H. Souter said in the main dissent. "I hope that a future court will reconsider today's dramatic departure from basic establishment-clause principle."

Justice Souter, who was joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer, read a summary of his dissent from the bench. He called the majority opinion "potentially tragic."

Justices Stevens and Breyer also filed their own dissents.

"Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy," wrote Justice Stevens. Justice Breyer expressed fears that the voucher decision would lead to more "religiously based social conflict."

A 'Restrained Opinion'

In his majority opinion, Chief Justice Rehnquist said the aid at issue in the Cleveland voucher program was constitutional based on a line of rulings that began in 1983, when the high court upheld a Minnesota program authorizing tax deductions for educational expenses, including tuition at religious schools.

Then-Associate Justice Rehnquist was the author of the court's opinion in that case, *Mueller* v. *Allen*.

The chief justice also cited the 1986 case of *Witters* v. *Washington Department of Services for the Blind*, which upheld the use of a state vocational scholarship by a graduate student at a religious seminary, and *Zobrest* v. *Catalina Foothills School District*, a 1993 decision that rejected an establishment-clause challenge to the use of a government sign-language interpreter to aid a deaf student enrolled in a Roman Catholic school.

Chief Justice Rehnquist said those cases "make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the establishment clause."

Kenneth W. Starr, the prominent Washington lawyer who was hired by the state of Ohio to help defend the voucher program, said the chief justice had grounded his opinion "in facts that were very powerful in Cleveland."

"Feelings ran high in this case, and I think the chief wrote a very restrained opinion," said Mr. Starr, a former U.S.. solicitor general, federal judge, and Whitewater independent counsel.

Douglas W. Kmiec, the dean of the law school at the Catholic University of America in Washington, said the court's ruling was not a radical departure in church-state law, but the logical extension of the *Mueller* line of cases.

"This is a development that could have reasonably been foreseen for some time," Mr. Kmiec said.

But proponents of strict separation of church and state agreed with Justice Souter that the scale of the aid that flows to religious schools under the Cleveland program was particularly troublesome.

"The amount of federal aid that may go to religious education after today's decision is startling," Justice Souter said in a footnote. He cited an estimate from the liberal Washington group People for the American Way that a national voucher program might cost $73 billion. That would amount to about 130 percent of the Department of Education's current annual budget.

Elliot M. Mincberg, the legal director of People for the American Way, said the decision "opens a major crack in [Thomas] Jefferson's metaphorical wall of separation. A good part of that wall is coming tumbling down on Cleveland public school children."

But like other opponents, Mr. Mincberg said vouchers still remain vulnerable to successful attack in the state courts, in legislatures, and in the court of public opinion.

"The fight with respect to school vouchers has only just begun," he said.

Parental Satisfaction

The Cleveland case took seven years from the enactment of the voucher plan in 1995 to reach a conclusion in the nation's highest court late last month.

The program pays up to $2,250 in tuition for each student to attend one of 49 schools currently participating. Parents are expected to contribute either 10 percent or 25 percent of the school's tuition, depending on family income.

The voucher program was challenged soon after its enactment by groups of taxpayers backed by the major teachers' unions and such organizations as the American Civil Liberties Union, People for the American Way, and Americans United for Separation of Church and State. The challenge bounced from state courts in Columbus to federal courts in Cleveland and Cincinnati, where the U.S. Court of Appeals for the 6th Circuit struck down the program last year as a violation of the establishment clause.

A panel of the Cincinnati-based court ruled 2-1 that the aid program was similar to a New York state tuition-reimbursement program for private school parents that the Supreme Court struck down in the 1973 case of *Committee for Public Education and Religious Liberty* v. *Nyquist*.

The 6th Circuit ruling was appealed to the Supreme Court by the state of Ohio as well as by a group of voucher parents and by several religious schools participating in the program, which has continued to operate pending the appeals.

The justices' written opinions reflect the intensity and complexity of the national debate over vouchers and school choice in recent years. The efficacy of the Cleveland program was not really at issue, but some of the justices still delved into the evidence from the Cleveland case about

student achievement and parental satisfaction.

Justice O'Connor, in her concurrence, cited the school choice research of Paul E. Peterson, William G. Howell, and Jay P. Greene that some private schools participating in the voucher program in Cleveland had higher rates of parental satisfaction than public schools did. Justice Souter shot back that "objective excellence," in the form of state tests, should be the benchmark, not parental satisfaction, and he was unimpressed with the achievement of voucher schools during their early years.

Justice Thomas expressed the most provocative sentiments in his concurrence.

"Today, many of our inner-city public schools deny emancipation to urban minority students," he said. Despite the promises of *Brown* v. *Board of Education*, the desegregation decision 48 years ago, "urban children have been forced into a system that continually fails them," he added.

"Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities," said Justice Thomas, the court's only African-American member.

Mr. Peterson, a professor at Harvard University's John F. Kennedy School of Government, said Justice Thomas' opinion "will come to be seen as the most important one in the long run."

"He really emphasizes that we have a two- tier system of education in this country," Mr. Peterson said. "One for whites and one for blacks. Giving black families vouchers gives them the same options most white families have."

In the days after the ruling, as the nation also debated a controversial federal appeals court ruling about the Pledge of Allegiance, there appeared to be serious reflection about whether vouchers now deserved a new look, or whether other approaches to improving public education should be tried instead.

"If you had asked me two weeks ago [before the voucher ruling], I would have agreed with the proposition that a decision such as this was not going to change the debate much," Mr. Peterson said. "But I am quite amazed at how much the landscape has changed. The president has personally put his prestige behind vouchers in a way he never has before."

'A New Conversation'

Joseph P. Viteritti, a professor of public policy at New York University's Robert F. Wagner School of Public Service and the author of a book about school choice, said the Supreme Court decision "has restructured the debate."

"I think there is a new conversation going on now based on a realization that urban education has not lived up to its promise," he said.

James W. Fraser, a professor of history and education at Northeastern University in Boston and the dean of its education school, said it could be 10 to 20 years before the full impact of the voucher ruling is realized.

"In the *Brown* v. *Board of Education* case, the Supreme Court said segregation must end, and

while it was a slower process than anyone dreamed, the country knew the result that would eventually be achieved," said Mr. Fraser, who has written a book about the separation of church and state in education.

"This ruling is the single largest moye away from the concept of common schools in our history," he added. "But it is a permissive ruling, and it remains to be seen whether it will actually result in a real movement away from common schools. The future is really up for grabs."

On the Web

In a statement issued July 27, 2002, National Education Association President Bob Chase vowed that "We will continue to fight for public schools and against vouchers—or related schemes to provide public funds to private and religious schools—at the ballot box, in state legislatures, and in state courts."

In a speech given July 1, 2002, in Cleveland, President Bush called the Supreme Court's voucher ruling "just as historic" as the court's 1954 decision in *Brown* v. *The Board of Education*. Posted by the White House.

In his majority opinion, Chief Justice Rehnquist said the constitutionality of the Cleveland voucher program derives from a long line of rulings, including:

- *Mueller v. Allen*;
- *Witters v. Washington Department of Services for the Blind*; and
- *Zobrest v. Catalina Foothills School District*.

(From Findlaw.)

Justice O'Connor, in her concurring opinion, cited the school choice research of Paul E. Peterson, William G. Howell, and Jay P. Greene. A number of Mr. Greene's reports and articles are compiled by the Manhattan Institute for Policy Research. The first chapter of Mr. Peterson's and Mr. Howell's 2002 book, *The Education Gap Vouchers and Urban Schools* is offered by the Brookings Institution. (Requires Adobe's Acrobat Reader.)

People for the American Way, which criticized the Supreme Court's ruling, maintains a record of state voucher or tuition tax credit voter referenda proposed since 1970. See also PFAW's 2001 report, "Five Years and Counting: A Closer Look at the Cleveland Voucher Program".

PHOTOS: Everyone had an instant reaction outside the Supreme Court building after the justices declared the Cleveland voucher program constitutional. More measured weighing of the ruling's impact on schools and states may take much longer.
—Allison Shelley/Education Week
Ralph G. Neas, president of People for the American Way and a voucher opponent, speaks to reporters after the ruling. The decision, he said, will cost public schools "millions of dollars."
—Allison Shelley/Education Week

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Voucher Battles Head To State Capitals

By John Gehring
Education Week

The foundation has been laid for a new round of legislative battles over school vouchers in state capitals from coast to coast.

Just days after the nation's highest court upheld the Cleveland voucher program, lawmakers in California, Minnesota, Pennsylvania, and elsewhere were talking up plans to seize on what is perceived as a new era for school choice.

"The constitutional debate is over," declared state Rep. Tony Kielkucki of Minnesota, a Republican and a former Catholic-school teacher. "The debate will now be a policy issue." He's already working to revive his failed voucher bill from earlier this year.

But even as voucher supporters celebrated the June 27 ruling, state policy experts pointed out that sizable hurdles must be cleared before those proponents can improve on their mostly unsuccessful legislative record.

To begin with, 37 state constitutions have language that prohibits state aid from going to religious schools. While advocates of school choice argue that such language is not insurmountable, it seems likely to stall voucher plans.

What's more, the fight for public opinion and political support will remain fierce. Since 1972, six pro-voucher state ballot initiatives have been defeated. Numerous legislative efforts have suffered the same fate. And it's not clear if the public is more willing now to embrace vouchers especially given a tepid economy that has many states fighting simply to preserve current levels of education aid.

"Most states are dealing with deficits, and their energy is

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focused on balancing budgets," said Todd Ziebarth, a policy analyst with the Denver-based Education Commission of the States. "You'll see some increased intensity, but I don't think the floodgates will open for vouchers."

Well-financed teachers' union opposition to vouchers also remains strong. In his July 2 keynote address to the National Education Association convention in Dallas, outgoing NEA President Bob Chase issued a warning to those looking to expand vouchers.

"We stand in principled opposition to vouchers," he told a crowd of cheering teachers. "And to the voucher ideologues, we make this promise: We will expose your false promises. We will lay bare your lies. And as we have done in California, Michigan, and everywhere else that vouchers have been on the ballot we will defeat you!"

Still, now that the U.S. Supreme Court has flattened the Mount Everest of a federal constitutional obstacle, voucher proponents are eager to whittle away the remaining barriers legal and political.

Clint Bolick, the vice president of the Institute for Justice, the Washington-based legal-advocacy group that has been in the thick of the court battles over vouchers, said the ruling allows supporters to "shift for the first time from defense to offense."

On State Turf

Such efforts are now under way.

For instance, the Minnesota Business Partnership is talking to Rep. Kielkucki about renewing a fight over his plan to offer vouchers to needy parents with children in low- performing schools. The proposal, which died in the legislature this year, could provide up to $5,950 per student more than double Cleveland's $2,250.

Meanwhile, the same day that the Supreme Court announced its decision, rumors flew in the Pennsylvania legislature that House Majority Leader John M. Perzel was seeking votes to add a last-minute voucher amendment to the state budget bill.

"It took on a life of its own," Stephen Miskin, a spokesman for the Republican lawmaker, said of the rumors. Mr. Perzel is a voucher supporter and, at the request of then-Gov. Tom Ridge, has sponsored past voucher legislation. But Mr. Miskin denied that his boss had angled to attach a voucher amendment to the budget bill; the spokesman guessed a lobbyist had floated the idea.

In California, just hours after the court's ruling, Sen. Ray Haynes, a Republican, huddled with his staff to draft a voucher bill he hopes to introduce that would give parents of students in low-performing schools tuition vouchers worth about $4,000.

But in a sign that the V-word remains primarily confined to the GOP lexicon, California Gov. Gray Davis, a Democrat, declared the same day: "Just because vouchers are legal does not make them right."

In the face of such divisions along partisan lines, the momentum from the Supreme Court decision may not be enough to transform voucher bills into law any time soon. By and large, voucher proposals have not been well-received in state legislatures over the years. Despite numerous

efforts, Florida is the only state to have a statewide voucher program. When Florida legislators passed their law in 1999, legislatures in Arizona, New Mexico, Pennsylvania, and Texas defeated such measures.

Even the support of popular governors like George W. Bush in Texas and Mr. Ridge in Pennsylvania failed to help much.

More recently, most states have taken a wait-and-see attitude on vouchers, knowing that the Supreme Court would likely take up the constitutional issue raised by allowing parents to use public money for religious schools, Mr. Ziebarth of the ECS said.

Even with that question resolved, he doubts the ruling will create a wave of voucher programs comparable to the surge in charter schools in the 1990s, when state economies were flush and there was bipartisan support for the independent public schools.

Instead, lawmakers may back less controversial school choice options, such as tuition tax credits or tax deductions, which give parents a break on their state taxes to help offset private school tuition.

"The ruling does create a more conducive overall climate for choice," Mr. Ziebarth said. "It will just be interesting to see where people put their energy."

Rep. Wayne Kuipers, the Republican chairman of the House education committee in Michigan, says voucher fights must first be won at the grassroots level.

"This [decision] may over time change people's perception about the validity of vouchers," Mr. Kuipers said. "But I don't know if there will be a rush to introduce legislation."

James E. Ryan, a law professor at the University of Virginia, said that voucher programs will continue to have a limited impact unless they are expanded. The most significant barrier to expansion, he argued, is the opposition of suburban parents.

"Suburbanites would not be all that wild about urban students having unlimited access to suburban schools," Mr. Ryan said. "A voucher program threatens the status of suburban schools."

Legal Challenges

In addition to political impediments, voucher advocates have to contend with provisions in 37 state constitutions, dating to the 1800s, that prohibit state aid to religious schools.

For example, while Maine and Vermont, in a long-standing practice known as "tuitioning," allow voucher-style tuition aid to students in communities that do not have their own public high schools, a line has been drawn when it comes to religious schools. Courts in both states have blocked those programs from expanding to religious schools.

The Institute for Justice hopes to challenge such constitutional amendments in federal court.

Meanwhile, voucher proponents will analyze the Supreme Court's majority decision to shape

proposals that offer school choice in the context of options like charter schools and magnet schools, suggested Perry A. Zirkel, a professor of law and education at Lehigh University in Bethlehem, Pa.

That is important, he said, because the Supreme Court noted that Cleveland parents can choose from a variety of school options, rather than simply using vouchers for religious schools.

Justice Sandra Day O'Connor, the crucial swing vote in the Ohio case, wrote that the Cleveland program "affords parents of eligible children genuine nonreligious options and is consistent with the establishment clause [of the First Amendment]."

Added Mr. Zirkel, "You want to provide a broader range of options, so if there was a legal challenge you can show a true range of choice."

Expanding in Florida

Len Reiser, a co-director of the Education Law Center in Philadelphia, said that beyond the remaining constitutional challenges, many states may be unwilling to shift the focus from standards-based reform efforts to the unproven and politically shaky terrain of vouchers.

"The focus has been how to improve public schools," Mr. Reiser said. "We haven't heard a lot of people in Pennsylvania suggesting the way to improve education is through vouchers.

"The issue with vouchers," he continued, "is more complicated than this constitutional cloud."

Meanwhile, last month's decision has cleared the way for further legal action in Florida, where a challenge to the state's voucher program had been put on hold since February, pending the Supreme Court's ruling on the Cleveland program.

A Leon County Circuit Court judge in Tallahassee was scheduled to hear a motion for summary judgment on July 9 filed by the Florida Chapter of the American Civil Liberties Union, which has argued that Florida's voucher program violates the state constitutional ban on providing public funds directly or indirectly to a church or sectarian institution.

Sunshine State education leaders have greeted the high court's ruling with enthusiasm. "This reaffirms the belief that parents are the ones best equipped to make decisions regarding the educational opportunities for their children," Commissioner of Education Charlie Christ said.

Florida's program offers vouchers to students in schools that have been given a failing grade on state testing for two out of four years. Worth up to $4,000 each, the vouchers can be used at public, private, or religious schools.

In 1999, two elementary schools in Pensacola became the first Florida schools eligible for vouchers. Following the newest round of state test grades released in June, 10 more schools around the state with some 8,900 students will be eligible for the vouchers.

Ballot Prospects

In addition to impending legislative efforts, school choice advocates are likely to consider campaigns to take their plans straight to voters.

Ballot initiatives that would have created vouchers have failed once each in Colorado and Maryland, and twice each in California and Michigan.

But the outlook could change following the recent decision, said M. Dane Waters, the president of the Washington-based Initiative and Referendum Institute, which tracks ballot initiatives.

"This ruling will help re-energize the movement and possibly embolden voucher proponents to try again," Mr. Waters said.

Voucher advocates, he added, have often lacked a consistent message. He pointed to the failed 2000 initiative in California that was criticized even by voucher supporters as being overly broad. That proposal, unlike the voucher program upheld in Cleveland, would not have been limited to children of low-income families in a specific school district. The measure was organized and backed by a Silicon Valley venture capitalist who ignored suggestions to seek a smaller program. He spent some $23 million on the measure, which was resoundingly defeated.

"In the last election cycle, the school choice movement was splintered," Mr. Waters said.

Joe Overton, the senior vice president of the Mackinac Center for Public Policy, a free-market research institute in Midland, Mich., said school choice advocates in his state have learned from lopsided defeats of 1978 and 2000 voucher initiatives.

As a result, he expects a state initiative on tuition tax credits, rather than vouchers, sometime in 2004 or 2006. "In Michigan, the word 'voucher' is radioactive," Mr. Overton said. "Tax credits are much more politically viable."

Campaign Issue

With gubernatorial elections in 36 states this coming November and legislative elections in just about every state, observers are watching to see what role a debate over vouchers and other school choice programs might play.

David Paris, the vice president for academic affairs and a professor of political science at Hamilton College in Clinton, N.Y., said that while some candidates will jump on the issue, others might avoid it.. "It all depends," he said, "on the local landscape and teachers' organizations in those states."

Vouchers seem sure to be a campaign issue in Ohio, whose legislature enacted the program that has passed muster with the Supreme Court. Lawmakers there who support school choice say they will push to build the Cleveland program. "There is no question in Ohio that from the lake to the river, there is interest in expanding school choices," said David Zanotti, the president of both the Ohio School Choice Committee and the Ohio Roundtable, an education and research organization.

Half the state's Senate seats and all seats in the House are up for grabs this fall. "There's a very significant battle ahead," Mr. Zanotti said..

Ohio Sen. Jim Jordan, a Republican, already is promising that he and other lawmakers will push to increase the value of the vouchers in Cleveland and expand the program to other districts.

In Wisconsin, Rep. Luther S. Olsen, the Republican chairman of the Assembly education committee, doubts Milwaukee's voucher program will expand because other communities are not clamoring for voucher programs.

While Cleveland became a natural fit for a voucher program because it was the largest and worst-performing district in Ohio, Sen. Jordan said other urban systems are prime candidates.

"The way to do it politically is to build on what has happened in Cleveland," he said. "The horse is out of the barn, but it'll be a fight."

On the Web

"Does the Supreme Court Decision on Vouchers Really Matter for Education Reform?," a July 2002 paper from the National Center for the Study of Privatization of Education, speculates on the broad impact of the Supreme Court's decision in *Zelman* v. *Simmons-Harris*. (Requires Adobe's Acrobat Reader.)

The voucher resource center from the National Education Association presents the anti-voucher side of the ongoing debate.

"School Choice 2001: What's Happening in the States" is the latest annual report from The Heritage Foundation.

People for the American Way, which criticized the Supreme Court's ruling, maintains a record of state voucher or tuition tax credit voter referenda proposed since 1970.

PHOTOS: Gov. Jeb Bush of Florida signs into law the nation's first statewide voucher program on June 21, 1999.
—Mark Foley/AP

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Education Week

American Education's Newspaper of Record

July 10, 2002

A Great Day, or Dark One, for Schools?

By Catherine Gewertz
Education Week

Charneice M. Broughton picked up her ringing telephone on the last Thursday in June to hear news that made her burst into tears of joy: The highest court in the land had just given its blessing to the voucher program that enables her to send her 8-year-old daughter to a private school.

"When I heard it, I just said, 'Oh, my God! Thank you, Jesus, God is good!'" said Ms. Broughton, a single mother in southeast Cleveland who works part time as a nursing assistant while studying for her nursing degree. "I need all the help I can get just to get through the school year."

A state-financed voucher covers 90 percent of the $2,000 yearly tuition bill for the Roman Catholic school that Ms. Broughton's daughter attends. The 7-year-old program allows 4,200 children of mostly low-income families to use state public school money to offset private school tuition. Income families to use state public school money to offset private school tuition.

The U.S. Supreme Court's June 27 ruling reverberated around the nation. Within minutes, advocacy groups of all stripes were issuing statements proclaiming it a great or a dark day for education. Parents and educators were celebrating, or resigning themselves to uneasy coexistence or renewed opposition.

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A Different Day

As a single parent in a troubled neighborhood on Cleveland's east side, Cheryl Mays would qualify for the voucher program, but wouldn't consider using it. She is happy with the magnet school her 11- and 12-year-olds attend, and the public Montessori preschool her 3-year-old will attend in the fall. "The quality of education is there for them," she said.

Cleveland public school advocates contend that the

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voucher debate has obscured the district's fiscal and academic strides. In each of the past three years, the budget has been balanced and test scores have risen, said Margaret Hopkins, the vice chairman of the school board. A $1 billion construction program will rehabilitate district buildings.

"It's frustrating, because the Cleveland Public Schools of 2002 is a very different school system than it was in 1995," Ms. Hopkins said. "The [Supreme Court] decision was based on an environment and context I believe no longer exists in the Cleveland public school system."

Roberta Kitchen, right, celebrates with Rosa-Linda Demore- Brown, the executive director of Cleveland Parents for School Choice.
—Ron Schwane/AP

The local teachers' union lambasted the voucher program for draining away from the district $14 million a year. "We already have a hard enough time providing what our children deserve, and [the voucher program] makes it even harder," said Meryl T. Johnson, the second vice president of the Cleveland Teachers Union, a 6,000- member affiliate of the American Federation of Teachers.

Michael Fox, who wrote the Cleveland voucher legislation as a Republican state representative in 1995, took particular satisfaction in the ruling. He said he had designed the program to withstand legal scrutiny, taking care to set it up so that voucher money flowed to parents instead of directly to private schools. The justices took note of that design in deciding that the program did not amount to a state endorsement of religion.

A 'Godsend'

At St. Mel School, a Cleveland Catholic school that enrolls 400 children in grades K-8, vouchers have been a "godsend" to the one in four families that use them, said Principal Patricia J. Kelly.

"People who could afford it have for years been using that opportunity for choice by moving to the suburbs where there are better schools, or sending their children to private school," Ms. Kelly said. "We feel the court certainly affirmed our thought that [low-income, urban] parents do have a right to a choice."

Similar sentiments, both for and against vouchers, echoed around Milwaukee, where a 12-year-old voucher program enacted by the Wisconsin legislature enrolls 10,000 children.

Tony Higgins, a single father, sent his two children to private secular and religious schools through the voucher program. Without it, he said, he would have had to put his girls into the "overcrowded, rundown buildings" of the Milwaukee schools, or send them on buses into suburban schools to secure a high-quality education.

Jennifer Morales, a Milwaukee school board member and a voucher critic, said she hoped that by addressing questions about vouchers' legality, the Supreme Court decision would ease the intense focus on vouchers that she believes has "warped" Milwaukee school politics. In this year's school board race, candidates' support for the voucher program was a pivotal issue.

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Howard L. Fuller, a former Milwaukee schools superintendent and a leading voucher advocate who is now a professor of education at Marquette University, cautioned that the decision opened the door to more intense political fighting than ever. He noted that a recent Wisconsin legislative session featured another in a series of attempts to derail Milwaukee's program.

"We are in a fight for our lives," Mr. Fuller said. "The issue is one of power, of not wanting parents to gain control over resources that the unions and other holders of the status quo have controlled."

Pressure to Improve

Around the country, national advocates expressed once again their long-held views on the voucher question, with the politically conservative clustering around support of the programs and the more liberal tending to oppose them.

The American Federation of Teachers, the National Education Association, and the advocacy group People for the American Way expressed their dismay over the ruling and vowed to fight voucher proposals in state legislatures. Major public education organizations, such as the National School Boards Association, the American Association of School Administrators, and groups representing school principals, all lamented the ruling, some citing polls showing that a majority of Americans oppose voucher programs.

"The issue is not, as some have stated, opposition to religious or other private schools; the issue is accountability to the public for quality education for all children," said Wendy D. Puriefoy, the president of the Public Education Network, based in Washington. "And private schools, whatever their virtues or shortcomings, are simply not accountable to the public."

Hugh B. Price, the president of the National Urban League, which opposes vouchers, said an expansion of such programs would be "ominous" because of their potential to drain resources from public education. In limited settings, however, they can pressure schools to improve, he said.

"The public schools need an additional spur to use the knowledge that's out there about how to improve the performance of low-income and minority children, to implement that knowledge on a systemic basis," Mr. Price said.

The Rev. Timothy McDonald III, the pastor of First Iconium Baptist Church in Atlanta and a leading voucher critic in the clergy, calls vouchers a "false promise" for needy urban families. "For those few families in the program, it works, but what about the thousands left in the public schools that you have just taken millions from? It's a benefit for a few at the expense of the many," he said.

The economist Milton Friedman, a senior research fellow at Stanford University's Hoover Institution, first proposed the idea of school vouchers in 1955. He praised the ruling in an interview, but said the true competitive pressure and benefit of vouchers would not work properly unless they were available to all parents and at all schools.

Voucher proponents such as the Washington groups Black Alliance for Educational Options and the Center for Education Reform said the ruling assures low-income parents and their children the same quality of educational opportunity that their wealthier counterparts have always enjoyed.

"This is a huge, resounding victory for families who have been wanting freedom of choice in schools for their kids," Christina Culver, the vice president for public affairs of Children First America, a Bentonville, Ark.-based pro-voucher group, said on the steps of the Supreme Court building moments after the ruling. "The public schools are failing and need to fix themselves, but parents can't afford to wait."

PHOTOS: Roberta Kitchen, right, celebrates with Rosa-Linda Demore-Brown, the executive director of Cleveland Parents for School Choice.
—Ron Schwane/AP

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Education Week

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Advocates' Post-Ruling Choice: Bubbly

By Mark Walsh
Education Week

Washington

Several mornings this June, Clint Bolick arrived at the U.S. Supreme Court and took a seat in the exclusive section of the gallery set aside for members of the court's bar.

The justices do not announce in advance which decisions they will release on a given day, so Mr. Bolick hoped each time that a ruling would come on the constitutionality of the Cleveland voucher program. For the past decade, Mr. Bolick has helped lead the legal defense of vouchers as a vice president of the Institute for Justice, a libertarian legal organization based here.

By June 27, the last day of the court's 2001-02 term, the voucher decision was one of four final rulings still to be announced and virtually certain to come to a long-awaited resolution. But instead of taking a seat in the courtroom, Mr. Bolick waited near the court's press room downstairs. The Cable News Network wanted him and a prominent voucher opponent available to react to the decision moments after it was released.

"We followed a reporter out the door, where she handed us the [court] opinions," Mr. Bolick said. "We had about 30 seconds to digest them before the CNN cameras went live. I had rehearsed two different speeches."

Mr. Bolick, of course, got to deliver his joyful reaction to the court's 5-4 ruling upholding the Cleveland program. Later, he and others at the institute celebrated the culmination of their decade-long quest with a case of Dom Perignon sent by one of its board members.

"I had never even smelled Dom Perignon, much less

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tasted it," Mr. Bolick said.

The Institute for Justice was established in 1991, and has been devoted to fighting as what it views as excessive government interference with entrepreneurs among them, African- American hair braiders and jitney cab drivers who have been stymied by local regulations. But its signature issue has been school choice, and its lawyers have intervened in legal battles around the country representing the low-income recipients of school vouchers.

Institute for Justice Vice President Clint Bolick, second from left, President William H. Mellor, to his left, and staff celebrate on June 27.
—Allison Shelley/Education Week

"When we started 11 years ago, we vowed that if you had a school choice plan, you had a lawyer," said William H. Mellor, the institute's president and general counsel.

Mr. Bolick, 44, who worked for Clarence Thomas when the Supreme Court justice headed the U.S. Equal Employment Opportunity Commission under President Reagan, initially gained prominence battling racial quotas.

As the Milwaukee and Cleveland voucher programs faced years of legal scrutiny, Mr. Bolick squared off in court numerous times against Robert H. Chanin, the general counsel of the National Education Association and the leading legal tactician against vouchers. ("Bolick v. Chanin," April 1, 1998.)

No Regrets

While Mr. Chanin was the lead lawyer arguing against vouchers during the Supreme Court's oral arguments in *Zelman* v. *Simmons-Harris* in February, Mr. Bolick did not get to address the justices. The pro-voucher argument in the Cleveland case instead was led by Judith L. French, an assistant attorney general of Ohio. Mr. Bolick raised a bit of a fuss last year when the state chose her to argue the case over the most prominent litigator on its legal team: Kenneth W. Starr, the former U.S. solicitor general and Whitewater independent counsel.

Mr. Bolick said the pro- voucher team eventually patched up any differences and worked together on presenting their case to the justices. He has no regrets about withdrawing a motion to argue part of the case himself.

Shortly before the ruling, he sent Mr. Chanin a note.

"I said no matter how the decision came down, he was a masterful lawyer, and I learned a lot from him during the course of this," he said.

Mr. Chanin was in Dallas preparing for the NEA's convention when the ruling came. "There is no doubt this will give momentum to the voucher movement," he said. "It will energize them. But they still have to persuade those who make the decisions that it is a sound educational program that provides meaningful answers. I'm not sure this ruling helps them in that task."

The Institute for Justice is a 501c (3) nonprofit organization with an annual budget of $5 million

and a staff of 28, including 10 lawyers. Its staff says two-thirds of its budget comes from small individual contributions and about one-third comes from a variety of foundations. It has no single prominent benefactor, they say.

The institute has embarked on an effort to open state chapters. Mr. Bolick moved to Phoenix last year to open the Arizona chapter and lead the nationwide state policy initiative. The institute remains committed to defending school choice programs, he said.

Neither his membership in the Supreme Court bar nor his prominent role in a landmark constitutional case exempted Mr. Bolick from confronting a duty usually encountered by recent law school graduates.

"I've been studying for the Arizona bar, and it's a bit of a comedown," he said. "It's a real exercise in humility."

On the Web

Clint Bolick reflects on the school choice movement's struggle to victory in "The Stuff of Kids' Dreams," in the *National Review Online*, June 28, 2002.

The Institute for Justice posts "School Choice: The Next Step: The State Constitutional Challenge," July 1, 2002, a short article by Clint Bolick and Richard Komer, an IJ senior attorney.

The firm's June 27, 2002, press release on the Supreme Court's voucher ruling includes statements by Mr. Bolick and Mr. Mellor.

Read an interview with Clint Bolick, from the Heartland Institute's *School Reform News*, January 2002.

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Education Week

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Catholics Laud Voucher Decision, See Potential for Growth

By Mary Ann Zehr
Education Week

Steve Behr, a pastor ordained by the Evangelical Lutheran Church in America, became a plaintiff in the case challenging the Cleveland voucher program because he believed it was "bad theology" for religious schools to take vouchers.

In Mr. Behr's view, the U.S. Supreme Court's decision to uphold those vouchers breaks down the wall between church and state, weakening the opportunity for religious people and schools to stay independent and be a conscience for society. "What freedom do I have in that [voucher-supported] school system to critique the government?" Mr. Behr asked.

But several administrators of Lutheran schools in Cleveland stand behind their decision to accept students as part of the voucher program, rejecting concerns about possible entanglement between church and state.

As such differences in opinion illustrate, people of faith are in anything but lockstep in their reaction to the Supreme Court's June 27 decision allowing vouchers to be used in religious schools. And those differences could explain what some see as a guarded enthusiasm for the ruling from religious and private school groups.

The most ebullient response to the court's decision came from educators at religious schools that already participate in voucher programs. They hope that voucher programs will go forth and multiply as a result of the ruling.

For Roman Catholics in particular, the Supreme Court decision was a great victory, said Bruce Cooper, an education professor at Fordham University in New York City. "They are carrying out a public mission, which is the education of inner-city children," he said. "It's not purely a religious mission."

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Catholic schools have participated in current voucher programs more than any other group of religious or private schools, mostly because they make up the only system of private schools that provides such an education at a reasonable cost, Mr. Cooper said. Catholic schools account for 30 percent of the nation's private schools and enroll nearly half the 5.3 million U.S. students who are in nonpublic schools.

"They tend to do a good job and at a very low cost," Mr. Cooper said.. Others noted the potential of vouchers to permit more children from families of modest means to afford an education at schools of their own religious faith.

Whether private schools with higher-priced tuitions, such as Jewish schools or nonreligious independent schools, get more involved in voucher programs will depend on "how big the voucher is and who's eligible to get it," Mr. Cooper said.

But even supporters of the high court's decision spoke about its impact in measured terms, saying that it wasn't clear whether the mission of private schools would mesh well with voucher programs if they were taken beyond the limited experiments now going on.

Chester E. Finn Jr., the president of the Washington-based Thomas B. Fordham Foundation, said he had wanted private school educators to respond more passionately to what he views as a "whole new ballgame constitutionally."

"I wanted more people to say, 'By God, this enables us to serve a lot more kids, and we're going to find a way to do that,'" he said.

Other observers simply felt the decision was overdue, pointing out that the federal and state governments have a history of sending aid to religious institutions, through college scholarships or tax exemptions, for example.

Most likely, observers said, already-established religious and private schools will benefit most from any expansion in voucher programs. No one, meanwhile, seems to think the court's decision and any new voucher programs it might lead to will spur a rush to create new schools.

Some religious and private school educators who support vouchers note that they keep the right to evaluate each voucher program to ensure that using vouchers doesn't translate into sacrificing their missions. If it does, they say, they won't participate.

Catholic Support

Leaders of the Roman Catholic Church seemed unanimous in approving of the Supreme Court decision, which can be seen as a vindication of efforts by Catholics throughout U.S. history to secure public aid for their schools.

As early as the mid-19th century, Archbishop John Hughes of New York made the argument that Catholics are taxed twice, once to pay for public education, and a second time with the money they spend on parochial schools, observed Jim C. Carper, an education historian at University of South Carolina in Columbia.

Catholics, Mr. Carper said, have tended to be more comfortable than some other religious groups "working in that ambiguous environment where government and church run into each other."

While other Christians, as well as Muslims and Orthodox Jews, run religious schools as part of the voucher programs in Cleveland, Milwaukee, and Florida, a majority are operated by Catholics. For example, 30 of the 49 schools participating in the Cleveland voucher program are Catholic.

"Parents have the right to choose where the money they pay in taxes goes into school support," said Claire M. Helm, the vice president of operations for the Washington-based National Catholic Educational Association. "That kind of choice is really good for the country."

Maureen Gallagher, the director of Catholic education for the Archdiocese of Milwaukee, which has 34 schools participating in the voucher program there, said the Supreme Court decision lends "political strength" to the voucher movement. She hopes the voucher program in Milwaukee will take advantage of that strength and expand its program to more children inside Milwaukee and to needy children outside the city.

"What this really has done is enabled families who want to choose a Catholic education to have the funds to do so," said Sister Carol Anne Smith, the secretary of education and superintendent of schools for the Catholic Diocese of Cleveland.

But some Catholics oppose vouchers even though the church leadership promotes them, acknowledged Paul A. Long, the vice president for public policy for the Michigan Catholic Conference, the public- policy arm for the Catholic Church in Michigan.

Two years ago, Catholic dioceses and institutions in Michigan contributed $3 million to a campaign to get a pro-voucher state ballot initiative passed. The measure failed. Exit polls showed that nearly two-thirds of Catholics voted against the initiative as did Protestants, though Catholics who attended Mass at least once a week were more likely than those who didn't to back the initiative according to Mr. Long.

Muslim school operators, too, are generally receptive to vouchers, said Sabah E. Karam of the Washington-based Council of Islamic Schools in North America. He pointed out that two Muslim schools, operated by African-American Muslims, participate in the Cleveland and Milwaukee voucher programs, out of the some 300 Muslim schools in the United States and Canada. Muslim educators like himself, Mr. Karam said, have encouraged their schools to become accredited by state agencies so they will be poised to take part in voucher programs.

Jewish Views

American Jews report more polarization on vouchers than Roman Catholics or Muslims do.

"Surprise, surprise the Jewish community is not monolithic," said Rabbi David Zwiebel, the vice president for government and public affairs for Agudath Israel of America, the advocacy arm for the National Society for Hebrew Day Schools, which counts about 600 K-12 schools in the United States and Canada as its members.

Rabbi Zwiebel said Orthodox Jews, who have been much more inclined than other branches of

Judaism to run their own schools, have long been supportive of school choice and vouchers, while secular Jews and Reform Jews, at the other end of the spectrum, have generally been opposed.

"We welcome the Supreme Court's decision," he said. "It will galvanize a fundamental debate in society as to how children can best be served through educational tax dollars." While a majority of Jews have sent their children to public schools, more are viewing Jewish education as a way to combat a loss of Jewish identity and practice, he added.

At the same time, Rabbi Zwiebel said, "the strings-attached question" about voucher programs needs to be monitored carefully. "It may well be that as states establish voucher programs, they may attach strings that are not good for Jewish schools and then we wouldn't participate," he said.

Mark J. Pelavin, the associate director of the Religious Action Center of Reform Judaism, confirmed that the official position of Reform Jewish congregations is that the Supreme Court made an incorrect ruling. "The government should not be funding religious institutions, religious worship, religious instruction," he said.

The argument that vouchers might permit some children from low-income families to receive a religious education who otherwise wouldn't get that chance is not a frivolous one, Mr. Pelavin said, but the financial threat that vouchers pose to public schools and to religious liberty outweigh their value.

When in comes down to it, however, said Bonnie S. Morris, the director of the Progressive Association of Reform Day Schools, she believes some of the nation's 22 Reform Jewish day schools would participate in voucher programs if given the chance.

Receiving Public Aid

People of faith who support vouchers point out that religious schools already receive public money through various government programs. Some say they see no difference between vouchers and the implementation of federal Pell Grants or the GI Bill at the higher education level, where public money follows students to whatever college they choose.

And, with the backing of Supreme Court decisions, K-12 religious and private schools already receive public aid for their students through government programs that pay for remedial teachers, transportation, and computers and other equipment.

Mr. Behr, the Lutheran pastor, said the upholding of vouchers sets a new precedent, though, because for the first time it permits K-12 schools to use public money for specific religious purposes, not just educational purposes. "There was somewhat of a wall," he said, "but now you can use the money for chapel services, building a sanctuary, anything you want."

But Mr. Carper, the education historian, said the decision could merely re-create situations that were considered acceptable in an earlier time in the nation's history.

"It has the potential for enhancing what I see as developing diversity in the American landscape which looks a lot like the early 1800s," he said, "where the line between public and private was blurred, and the emphasis was on whether the institution served the public good.

"How it is governed and financed is secondary."

On the Web

"Cleveland School Vouchers: Where the Students Go," a January 2002 study from Policy Matters Ohio, a nonprofit economic policy research organization, finds that "99.4 percent of voucher students are enrolled in religious schools." (Requires Adobe's Acrobat Reader.)

Read "Parochial Schools and Public Aid: Today's Catholic Schools," June 2000, posted by the Thomas B. Fordham Foundation. Author Christopher Connell details the types of government aid parochial schools receive.

The following opinion pieces and news releases address the potential impact of the Supreme Court's decision on religious and private education:

- "Bad for Education, Bad for Religious Freedom" from the American Civil Liberties Union: "Today's decision is bad for education and bad for religious freedom."
- "Catholic Leaders Applaud Supreme Court Decision in Cleveland Voucher Case" from the National Catholic Educational Association: "In affirming the constitutionality of the Cleveland voucher program, the Supreme Court has disarmed the opponents of full and fair parental choice in education."
- "Voucher Win's Ripple Effect on Faith Groups," from *The Christian Science Monitor*: The "ruling presented a heady breakthrough for advocates who seek to expand the place of religion in American public life."
- "The Supremes Pledge Allegiance to God," from *Slate*: "Under the guise of promoting 'free choice' and state aid 'neutrally given,' the Supreme Court approved a voucher scheme for a school district in which religious schools hold a virtual monopoly."

PHOTOS: Sister Carol Anne Smith of the Catholic Diocese of Cleveland praises the Supreme Court's voucher ruling to a group gathered at Holy Name Elementary School soon after the ruling was handed down. Sixty-one percent of students at the school receive vouchers.
—Robert Wetzler for Education Week

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Education Week

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July 10, 2002

Ruling Gives Second Wind To Capitol Hill Voucher Advocates

By Erik W. Robelen
Education Week

Washington

The hubbub outside the U.S. Supreme Court building had barely died down late last month before the action shifted to the big white dome across Capitol Hill's First Street.

Just hours after the court upheld the Cleveland school voucher program, a leading House Republican introduced a bill that would help more than 8,000 District of Columbia students from low-income families attend private schools. And within days, President Bush descended on the northern Ohio city to deliver an unabashed pitch for expanding the voucher movement locally and, in some form, nationally. For good measure, he moved on to Milwaukee the next day, again dwelling for awhile on choice while speaking at a church that participates in that city's pioneering voucher program.

Backers of publicly financed vouchers that can be used to pay tuition at secular and religious private schools hope the high court's ruling will spur their efforts to provide a federal subsidy for that purpose.

The two leading candidates on the table right now appear to be the District of Columbia voucher bill, put forward with such dispatch by House Majority Leader Dick Armey, R-Texas, and President Bush's plan for education tax credits. One proposed use of those credits is to pay up to $2,500 in private school tuition for students wishing to leave struggling public schools.

But a blessing by the Supreme Court won't necessarily translate into a win on Capitol Hill, where the barriers to subsidizing private school choice have been far more about politics than the U.S. Constitution. Indeed, some experts on Congress argue that the situation is unlikely to change much.

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"The court settled the legal issues; the political problems remain," said Marshall Wittmann, a senior fellow in the Washington office of the Hudson Institute, an Indianapolis-based think tank. "It's just not going to happen. .... It's a nonstarter for the unions that the Democrats are not going to buck."

Not everyone, though, is so sure.

"The chemistry has changed in that pro-voucher people have more momentum now," said Jack Jennings, the director of the Washington-based Center on Education Policy and a former longtime aide to House Democrats. "Anyone who has a Supreme Court decision in their favor has a little wind at their back. This is going to help them nationally."

During his Great Lakes sojourn last week, Mr. Bush offered praised for the 5-4 ruling, in which the majority held that directing taxpayer money to religious schools is constitutional under the First Amendment clause forbidding a government establishment of religion, provided that such direction results from a parent's independent choice from among both religious and secular schools.

"The Supreme Court of the United States gave a great victory to parents and students throughout the nation by upholding the decisions made by local folks here in the city of Cleveland, Ohio," the president said July 1. "One of my jobs is to make sure that we continue to insist upon reform, to take this court decision and encourage others to make the same decision at the local level. One way to do so is through tax credits, which is now in my budget."

Taking Credits

As part of his proposed spending plan for fiscal 2003, released in February, Mr. Bush called for a federal income-tax credit of up to $2,500 to help families transfer a child out of a public school identified by the state as failing to make "adequate" academic progress under the "No Child Left Behind" Act of 2001. Parents who opted to send the child to a private school or another public school would receive a refundable credit on their tax returns for 50 percent of the first $5,000 in tuition, fees, and transportation costs.

The credit could also be used to offset the costs of private tutoring, books, and computers to enhance a child's education. Because the credit would be refundable, parents who did not earn enough to owe income taxes would instead receive cash from the federal government.

The education tax credit essentially tries to do through the tax code what Mr. Bush could not accomplish during last year's debate on the No Child Left Behind Act, which reauthorized the Elementary and Secondary Education Act. Originally, the president wanted students who attended poor-performing schools to be able to use a portion of those schools' federal aid to attend other schools, whether public or private, or use the money to get tutoring. The private-school-tuition piece was effectively jettisoned early in the debate last year, as Democrats made clear that their opposition to vouchers was non-negotiable.

Aside from resurrecting the concept months later in his 2003 budget, albeit in a different form, President Bush also proposed in his fiscal 2003 budget for the Department of Education to set up a $50 million choice demonstration fund that would provide grants to expand school choice, including for private schools.

The chief barrier to vouchers or tuition tax credits is the Senate, where Democrats hold a slim majority and any such measure would need 60 votes to avoid or stop a filibuster. While a handful of Democrats have supported voucher experiments before, opponents said there have never been enough to meet the 60-vote threshold, especially with a few moderate Republicans opposed.

In 1997, the Senate, then controlled by the GOP, approved a District of Columbia voucher bill on an unrecorded voice vote. It cleared the House in the spring of 1998. But President Clinton promptly vetoed the bill, an expected result that those familiar with events say explained Senate Democrats' willingness to let the bill pass.

"I'm optimistic that we still have the votes to defeat vouchers on the Senate floor," said Jim Manley, a spokesman for Sen. Edward M. Kennedy, D-Mass., the chairman of the Senate Health, Education, Labor, and Pensions Committee.

Shortly after the Supreme Court decision came down, Sen. Kennedy made clear his mind was unchanged.

"Private school vouchers may pass constitutional muster, but they fail the test when it comes to improving our nation's public schools," he said.

Mr. Manley noted that the last time the Senate took a vote on a voucher measure, as part of the debate over the No Child Left Behind Act last June, it received only 41 votes. That proposal, offered by Sen. Judd Gregg, R-N.H., would have provided $50 million for a pilot voucher program. Mr. Kennedy and other leading Democrats have made clear that they view the president's tuition tax credits as simply another form of vouchers.

Another obstacle, at least for this year's congressional doings, is the backlog of legislation, including 13 must-pass spending bills, a prescription-drug bill, and a plan to create a homeland security department.

"[Lawmakers] already have a huge agenda for the remainder of this year, and just not time to complete it," said Norman J. Ornstein, a senior scholar at the American Enterprise Institute, a Washington think tank. "To add a debate on vouchers would be extremely difficult. ... No doubt conservatives, especially in the House, will be dying to do that."

Mr. Ornstein said he thought there was a "pretty good chance" the House could pass the education tax credits, but he predicted there would be no action in the Senate. He added, however, that even in the House, it would be a "tricky business" to get the tax- credit plan through. Beyond the busy schedule, another problem that could complicate matters is finding the money to pay for more tax breaks.

Armey's Bill

Mr. Jennings of the Center on Education Policy said that given the larger obstacles to tax legislation, the District of Columbia plan might be the bill to watch. He suggested that Republicans could attach it to the appropriations bill for the nation's capital.

Dan Gerstein, a spokesman for Sen. Joseph I. Lieberman of Connecticut, one of the few Senate Democrats to support a voucher experiment in the past, said that while he believes the Supreme

Court decision "removes one of the hurdles" to vouchers, it's still an uphill battle.

"At this point, it's anyone's guess whether [a District of Columbia voucher plan] could pass through the Senate," he said. "There will be a lot of vehement opposition."

As many as 12 to 15 Senate seats could be genuinely up for grabs in November, political analysts say, and a significant shift then could materially affect the voucher debate.

But with the current cast of characters, said Dan Katz, the director of legislative affairs for the advocacy group Americans United for the Separation of Church and State, the Senate likely will remain a sufficiently sturdy roadblock to any voucher plan.

"The bottom line is that, as far as Congress is concerned, this fight has always been about education policy, not constitutional issues," Mr. Katz said. "How often were you hearing people on the floor debating the finer points of the establishment clause?"

On the Web

In a speech given July 1, 2002, in Cleveland, President Bush declared that "One of my jobs is to make sure that we continue to insist upon reform, to take this court decision and encourage others to make the same decision at the local level." From the White House.

PHOTOS: President Bush, in Cleveland to talk about vouchers and other domestic issues, greets some of the 3,000 or so representatives of community groups after his July 1 speech.
—Paul J. Richards/Agence France-Presse

' 2002 Editorial Projects in Education Vol. 21,'number 42,'page 27

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Education Week

American Education's Newspaper of Record

July 10, 2002

A Long Road to the Court

Education Week

Given the ferocity of the debate over vouchers, it is often forgotten that early in the history of the United States, religiously affiliated schools at times received generous public funding from states and cities. By the mid-19th century, with the rise of the common school and the increasing desire by Roman Catholic immigrants for their own schools, government aid to private schools gradually declined. Such aid to religious schools was generally not considered unconstitutional, however, until the 14th Amendment was interpreted as applying to the states the First Amendment's prohibition on a government establishment of religion. The specific policy debate on vouchers that led to the U.S. Supreme Court's June 27 decision is a post-World War II phenomenon. Here's a look at some mileposts on the way to that ruling:

1800

1869

Vermont passes a law authorizing "tuitioning," in which the state and districts pay for children to attend private schools in towns without their own public schools. Today, in some 90 Vermont towns without high schools, districts pay tuition for some 6,500 children to attend secular private schools.

1873

Maine adopts a tuitioning law. Today, some 5,600 students from 55 towns without high schools attend secular private schools at state and district expense.

1876

Congress falls short of passing the so-called Blaine Amendment. If state legislatures had then ratified it, the measure would have amended the U.S. Constitution to prohibit any religious sect from controlling public funds for schools. The amendment was named for **Rep. James G. Blaine** of Maine, the 1884 Republican presidential nominee. Many states later added similar language to their own constitutions

1900

1925

In *Pierce* v. *Society of Sisters*, the U.S. Supreme Court upholds the right of parents to choose to send their children to private schools

1947

In *Everson* v. *Board of Education of Ewing*, the Supreme Court upholds the use of public school buses to transport private and parochial school students. But the decision also establishes a principle that "no tax" should go to support religious activities or institutions.

1955

Economist **Milton Friedman** writes an article ("The Role of Government in Education," from *Economics and the Public Interest*, 1955) that proposes a system of school vouchers to introduce competition into the educational system.

1973

In *Committee for Public Education and Religious Liberty* v. *Nyquist*, the Supreme Court rules against direct state subsidies to religious schools for repair and maintenance of facilities, and strikes down tuition reimbursements and tax credits for parents of children in religious schools.

1983

In *Mueller* v. *Allen*, Supreme Court upholds Minnesota's tax deduction for private school tuition, including tuition at religious schools, the first in a series of rulings that school voucher proponents view as favorable to their cause.

1990

Academics John E. Chubb and **Terry M. Moe** (left) publish *Politics, Markets, and America's Schools*, a highly influential book that calls for states to govern public schools more like private schools and to create systems that foster greater competition for students between public and private schools.

Wisconsin's legislature adopts a landmark urban voucher program authorizing 1,000 Milwaukee schoolchildren to attend secular private schools at state expense.

1995

Wisconsin expands the Milwaukee voucher program to allow the participation of religious schools.

Ohio adopts a voucher program for the Cleveland district that includes religious schools.

1996

An Ohio state judge upholds the Cleveland voucher program; children begin using vouchers to attend religious schools there for the first time on a wide scale.

1998

The Wisconsin Supreme Court rules that inclusion of religious schools in the Milwaukee voucher program does not violate U.S. Consititution's prohibition against a government establishment of religion. Despite widespread anticipation that it will take up the case, the U.S. Supreme Court declines. The Wisconsin program spreads to religious schools and now includes about 10,000 student participants.

1999

Florida adopts the first statewide voucher program, open to students in failing schools that do not improve their performance. Such students may receive vouchers to attend other public schools or private schools, including religious schools.

The Ohio Supreme Court rules that inclusion of religious schools in the Cleveland program does not violate the U.S. Constitution, but it strikes down the program on state procedural grounds. The legislature reauthorizes the program, and the new law is challenged in federal court. A federal district judge in Cleveland strikes down the program as "skewed toward religion."

2000

2000

In *Mitchell* v. *Helms*, the U.S. Supreme Court upholds a federal program that lends computers and other equipment to religious schools. Four justices sign an opinion signaling that they would uphold the inclusion of religious schools in a voucher program as long as the government aid was offered on a neutral basis.

A federal appeals court in Cincinnati rules against the Cleveland voucher program.

2001

The new Bush administration joins the state of Ohio and other voucher advocates in asking the Supreme Court to hear the Cleveland case. The justices accept the case at the beginning of their 2001-02 term.

2002

Feb. 20: The Supreme Court hears 80 minutes of

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Voucher supporters rally outside the Supreme Court on Feb. 20. Opponents were out in force, too.

oral arguments on the constitutionality of the Cleveland program, which has some 4,200 participants.

June 27: The Supreme Court, 5-4, upholds the Cleveland voucher program.

SOURCES: *Education Week*, *CQ Researcher*

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Education Week

American Education's Newspaper of Record

July 10, 2002

In the Court's Words

Education Week

Following are excerpts from the majority, concurring, and dissenting opinions in the U.S. Supreme Court's June 27 decision in the Cleveland voucher case, Zelman v. Simmons-Harris:

Majority Opinion | Concurring Opinions | Dissenting Opinion | Also in Dissent

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Majority Opinion

Chief Justice William H. Rehnquist, *joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas:*

The state of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the establishment clause of the United States Constitution. We hold that it does not.

... The establishment clause of the First Amendment, applied to the states through the 14th Amendment, prevents a state from enacting laws that have the purpose or effect of advancing or inhibiting religion. There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden effect of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid

For More Information

The complete text of the court's opinions in *Zelman v. Simmons-Harris* is available from Findlaw. The U.S. Supreme Court also offers the complete text of

The Voucher Decision: Charting the New Landscape Of School Choice

- Justices Settle Case, Nettle Policy Debate
- Voucher Battles Head To State Capitals
- A Great Day, or Dark One, For Schools?
- Advocates' Post-Ruling Choice: Bubbly
- Catholics Laud Voucher Decision, See Potential For Growth
- Ruling Gives Second Wind to Capitol Hill Voucher Advocates
- Chronology: A Long Road To Court
- In the Court's Words
- Story Index

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directly to religious schools and programs of true private choice, in which

the opinions in a PDF file. (Requires Adobe's Acrobat Reader.)

government aid reaches religious schools only as a result of the genuine and independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has changed significantly over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken.

Three times we have confronted establishment clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

Chief Justice William H. Rehnquist

... We believe that the program challenged here is a program of true private choice ... and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the state of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of all schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

... Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a public perception that the state is endorsing religious practices and beliefs. But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.

... Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the establishment clause. The establishment clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

Justice Souter speculates that because more private religious schools currently participate in the

program, the program itself must somehow discourage the participation of private nonreligious schools. But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. Indeed, by all accounts the program has captured a remarkable cross section of private schools, religious and nonreligious. It is true that 82 percent of Cleveland's participating private schools are religious schools, but it is also true that 81 percent of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school- choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater.

... In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the establishment clause.

Concurring Opinions

Justice Sandra Day O'Connor

While I join the court's opinion, I write separately for two reasons. First, although the court takes an important step, I do not believe that today's decision, when considered in light of other long-standing government programs that impact religious organizations and our prior establishment clause jurisprudence, marks a dramatic break from the past. Second, given the emphasis the court places on verifying that parents of voucher students in religious schools have exercised true private choice, I think it is worth elaborating on the court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.

Justice Sandra Day O'Connor

These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds. The share of public resources that reach religious schools is not, however, as significant as respondents suggest. Data from the 1999-2000 school year indicate that 82 percent of schools participating in the voucher program were religious and that 96 percent of participating students enrolled in religious schools ... but these data are incomplete. These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent.

... Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999-2000.

... Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax; the corporate income tax in many states; and property taxes in all 50 states; and clergy qualify for a federal tax break on income used for housing expenses. In addition, the federal government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. Finally, the federal government and certain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools.

... These tax exemptions ... are just part of the picture. Federal dollars also reach religiously affiliated organizations through public-health programs such as Medicare and Medicaid, through educational programs such as the Pell Grant program and the GI Bill of Rights, and through child-care programs such as the Child Care and Development Block Grant Program. These programs are well-established parts of our social welfare system and can be quite substantial.

... Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs.

Justice Clarence Thomas

Frederick Douglass once said that "[e]ducation means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today many of our inner-city public schools deny emancipation to urban minority students. Despite this court's observation nearly 50 years ago in *Brown v. Board of Education* that it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education, urban children have been forced into a system that continually fails them.

... To determine whether a federal program survives scrutiny under the establishment clause, we have considered whether it has a secular purpose and whether it has the primary effect of advancing or inhibiting religion. I agree with the court that Ohio's program easily passes muster under our stringent test, but, as a matter of first principles, I question whether this test should be applied to the states.

The establishment clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." On its face, this provision places no limit on the states with regard to religion. The establishment clause originally protected states, and by extension their citizens, from the imposition of an established religion by the federal government.

Justice Clarence Thomas

... Whatever the textual and historical merits of incorporating the establishment clause, I can accept that the 14th Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through the incorporation of the 14th Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.

Dissenting Opinion

Justice David H. Souter, *joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, and John Paul Stevens*:

The court's majority holds that the establishment clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the establishment clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these.

Justice David H. Souter

... The applicability of the establishment clause to public funding of benefits to religious schools was settled in *Everson* v. *Board of Education of Ewing*, which inaugurated the modern era of establishment doctrine. The court stated the principle in words from which there was no dissent:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

The court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.

... How can a court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.

... The majority looks not to the provisions for tuition vouchers, but to every provision for educational opportunity ... The majority then finds confirmation that participation of all schools satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) participate in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. Neutrality as the majority employs the term is, literally, verbal and nothing more.

... There is ... no way to interpret the 96.6 percent of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6 percent reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has. For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the state did not deliberately design the network of private schools for the sake of

channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

... [I]t is well to remember that the money has barely begun to flow. Prior examples of aid, whether grants through individuals or in-kind assistance, were never significant enough to alter the basic fiscal structure of religious schools; state aid was welcome, but not indispensable. But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income.

... Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines a nationalistic sentiment in support of Israel with a deeply religious element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this nation not only because the free-exercise clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

... *Everson*'s statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the establishment clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the establishment clause is largely silenced. I do not have the option to leave it silent, and I hope that a future court will reconsider today's dramatic departure from basic establishment clause principle.

Also in Dissent

Justice Stephen G. Breyer, *joined by Justices John Paul Stevens and David H. Souter*

... I write separately ... to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the establishment clause concern for protecting the nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, parental choice cannot significantly alleviate the constitutional problem.

The First Amendment begins with a prohibition, that Congress shall

Justice Stephen G. Breyer

make no law respecting an establishment of religion, and a guarantee, that the government shall not prohibit the free exercise thereof. These clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to worship God in their own way, and allows all families to teach their children and to form their characters as they wish. The clauses reflect the Framers' vision of an American nation free of the religious strife that had long plagued the nations of Europe.

... When it decided these 20th-century establishment clause cases, the court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools, including the first public schools, were Protestant in character.

... The 20th-century court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. There were similar percentage increases in the Jewish population. Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools.

.... The 20th-century court was also aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact they had exacerbated religious conflict. Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the Protestant position on this matter, scholars report, was that public schools must be nonsectarian (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support sectarian schools (which in practical terms meant Catholic).

... The upshot is the development of constitutional doctrine that reads the establishment clause as avoiding religious strife, not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state, at least where the heartland of religious belief, such as primary religious education, is at issue.

... School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the state to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a nation, threaten social dissension?

... History suggests, not that such private school teaching of religion is undesirable, but that government funding of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university. Contrary to Justice O'Connor's opinion, history also shows that government involvement in religious primary education is far more divisive than state property-tax exemptions for religious institutions or tax deductions for charitable

contributions, both of which come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other.

The court, in effect, turns the clock back. It adopts, under the name of neutrality, an interpretation of the establishment clause that this court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the establishment clause concern for social concord. An earlier court found that equal-opportunity principle insufficient; it read the clause as insisting upon greater separation of church and state, at least in respect to primary education. In a society composed of many different religious creeds, I fear that this present departure from the court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the nation's social fabric.

Justice John Paul Stevens

Justice John Paul Stevens

... [T]he wide range of choices that have been made available to *students within the public school system* [italics from the opinion text] has no bearing on the question whether the state may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion." The state may choose to divide up its public schools into a dozen different options and label them magnet schools, community schools, or whatever else it decides to call them, but the state is still required to provide a public education and it is the state's decision to fund private school education over and above its traditional obligation that is at issue in these cases.

... I am convinced that the court's decision is profoundly misguided.

PHOTOS: Photographs are courtesy of the U.S. Supreme Court Historical Society.

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